UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

MIKE-SELL'S POTATO CHIP COMPANY

and Case 09-CA-184215

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT),
GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS,
SALES, AND SERVICE, AND CASINO EMPLOYEES,
TEAMSTERS LOCAL UNION NO. 957

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION:

This case is before Administrative Law Judge Andrew Gollin upon the General Counsel's complaint and amendment to complaint alleging that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union over its decision to sell its Ohio Routes #102, #104, #122 and #131, and by failing and refusing to furnish the Union with requested information. The record evidence convincingly supports the General Counsel's legal argument.

II. STATEMENT OF THE CASE:

The original charge involving the above-captioned case was filed on September 14, 2016. [1]/ (G.C. Ex. 1(a)) [2]/ and amended on December 9. (G.C. Ex. 1(c)). On May 31, 2017, the Charging Party filed a second amended charge. (G.C. Ex. 2)

On May 31, June 1 and 2, 2017, an unfair labor practice hearing was held in Cincinnati, Ohio. Based on the evidence adduced at the hearing, General Counsel maintains that the following issues are presented for determination.

[1]/ All dates referred to herein are in 2016 unless otherwise noted.

[2]/ References to the transcript will be designated as (Tr. __); General Counsel's Exhibit will be designated as (G.C. Ex. __); Charging Party's Exhibits will be designated as (C.P. Ex.__); Respondent's Exhibits will be designated as (Resp. Ex. __); and, Joint Exhibits will be designated as (Jt. Ex. __).

III. **ISSUES**:

1. Whether the sale of Respondent's Routes #102, #104, #122 and #131 are mandatory subjects of bargaining?

2. Whether Respondent failed and refused to bargain about the sale of its Routes #102, #104, #122 and #131 in violation of Section 8(a)(1) and (5) of the Act?

3. Whether the Charging Party/Union waived its right to bargain about the sale of Routes #102, #104, #122 and #131?

4. Whether Respondent failed and refused to provide the Charging Party/Union with information it requested?

IV. **BACKGROUND**:

Respondent Mike-Sell's Potato Chip Company is engaged in the production and distribution of snack foods. (Tr. 70, 186, 232) Respondent is a privately held corporation. (Tr. 232) Respondent produces a variety of potato chips at its Dayton, Ohio facility and corn extruded products at its Indianapolis, Indiana facility. (Tr. 232) Respondent distributes its products using two methods of distribution-direct store delivery (DSD) and warehouse/direct sales. (Tr. 233) Respondent and the Union have been signatory to successive collective-bargaining agreements since at least 1982. (Tr. 70, 146, 186) The most recent agreement expired by its terms on November 17, 2012. (Jt. Ex. 1)

In or about 2012 and 2013, Respondent sold some of its outlying routes to subcontractors/independent contractors. (Tr. 137, 302-304, 307-308) These routes involved the transporting of Respondent's products to outlying locations – either smaller warehouses or storage units from its Dayton, Ohio production facility and warehouse (Dayton Distribution Center/Warehouse) using its over-the-road drivers (Tr. 691, 1008) where the products were then loaded and distributed by its employees. (Tr. 1008) In November 2011, the Union protested the sale of an outlying route in Marion, Ohio assigned to Angie Watson. (Tr. 259; Resp. Ex. 2) The

matter was arbitrated and the Union's grievance was denied. (Resp. Ex. 2) Arbitratior Paolucci found that the arbitration case involved the transfer of all of the expense of the route sales driver's route and any potential revenue to a third party on a route that was unprofitable and the loss from the route was ongoing. The arbitrator classified this as a losing proposition. (Resp. Ex. 2, p.18) Arguably, that the arbitrator incorrectly held that the independent contractor chose its customers. Thereafter, Respondent continued to sell similar distant, remote and unprofitable routes. (Tr. 302-304, 307-308) The Union did not protest these sales because of the holding in the Paolucci award.

In April 2016, Respondent announced that it was going to sell three (3) routes. (Tr. 73, 147; Jt. Exs. 2 and 3) These were local routes that were serviced directly from the Dayton, Ohio production facility and warehouse and which were void of the transportation and storage costs involved in all of the preceding sales. (Tr. 718) The Union immediately filed a grievance over the announced sale, which was denied. (Tr. 74, 75-76, 80, 148; Jt. 148, Jt. Ex. 4) About July 11, Respondent sold Route #102 to an independent contractor. Then in or about late August or early September, Respondent sold two of its routes (#104 and #122) to employee Lisa Krupp. (Tr. 83, 189; Jt. Ex. 77) About August 29, the Union grieved the sale of these routes. (Tr. 83-84; Jt. Ex. 7). This grievance was denied through the first three steps of a four-step grievance procedure. (Tr. 83-84; Jt. Ex. 7; G.C. Exs. 3 and 4) Finally, about September 12 Respondent sold a fourth route – Route #131. (Tr. 90; Jt. Ex. 10) The Union grieved this sale too. (Tr. 90-91; Jt. Ex. 11) This grievance was also denied through the first three steps of the grievance procedure. (G.C. Exs. 4 and 5) None of these grievances were arbitrated because the collective-bargaining agreement expired in 2012. (Tr. 80)

About August, Allen Weeks, the Union's recording secretary and business agent, requested, in writing, to meet and bargain with Respondent about these sales. (Tr. 89, 156-157; Jt. Ex. 8) In this letter, the Union also requested Respondent provide it with certain information

related to these sales. (Jt. Ex. 9) Respondent, admittedly, refused to bargain about its decision to sell its routes and also, admittedly, refused to provide the requested information. (Tr. 89, 157; G.C. Exs. 1(g) and 1(h))

V. **THE UNFAIR LABOR PRACTICE**:

Richard Vance, steward, credibly testified that in April Respondent announced that it was selling three of its sales routes. (Tr. 74, 75-76; Jt. Ex. 2) Vance further testified that after consulting with the Union's Recording Secretary and Business Agent Allen Weeks, that he immediately filed a grievance over the sale of these unidentified routes. (Tr. 74-75; Jt. Ex. 4) About June 12, this grievance was denied at the third step. (Tr. 80, 150-151, Jt. Ex. 4) Thereafter, about July 11, Respondent sold its Route #102 to Charles Moms. (Tr. 588) Then about late August or early September, Respondent sold its Routes #104 and #122 to Lisa Krupp, vacation/swing route sales driver. (Tr. 83, 944, 958) Vance filed another grievance over the sale of these two routes. (Tr. 84; Jt. Ex. 7) Weeks credibly testified that after consulting with the Union's attorney, he requested, in writing, to meet and bargain with Respondent regarding the sale of these routes. (Tr. 156-157; Jt. Ex. 8) In this letter, Weeks also requested certain information from Respondent regarding these sales. (Tr. 88, 158; Jt. Ex. 8) By letter dated September 12, Respondent refused to bargain about its decision to sell its routes and also refused to provide the requested information. (Tr. 157-158; Jt. Ex. 9) Later on this same date, Respondent notified the Union that it sold Route #131. (Tr. 84, 159; Jt. Ex. 10) Vance again filed a grievance over the sale of this fourth route. (Tr. 90, 160; Jt. Ex. 11) These actions are corroborated by the testimony of Weeks, Vance and Executive Vice-President of Sales and Marketing Phillip Kazer. (Tr. 88, 159-160)

VI. **LEGAL ANALYSIS**:

A. Respondent's Decisions to Sell the Four Ohio Routes Were Mandatory Subjects of Bargaining:

It is undisputed that on April 27, by letter, (Jt. Ex. 3), Respondent announced that it was going to sell three routes in accordance with their rights recognized by Arbitrator Michael Paolucci in FMCS Case No. 121212-51687-6 (Resp. Ex. 2) Respondent did not identify any specific routes at that time. On May 6, Richard Vance, steward, filed a grievance over the announced sale(s). (Jt. Ex. 4) About June 12, Respondent orally denied this grievance at the third step of the grievance proceeding. (Tr. 80, 148; Jt. Ex 4) Then about July 11, by letter, Respondent announced that in accordance with the Paolucci award it was selling Route #102 effective July 24. (Jt. Ex. 5) Then on August 29, Respondent, by letter, announced the sale of Routes #104 and #122. (Tr. 83, 189; Jt. Ex. 6) About August 29, Vance filed another grievance over the sale of these two routes. (Tr. 83-84; Jt. Ex. 7) This grievance was not heard at the third step until January 2017. On August 31, the Union, by letter, requested to meet and bargain about the sale of the three routes. (Tr. 89, 156-157; Jt. Ex. 8) The Union stated that after reviewing the Paolucci award it disagreed with Respondent's interpretation that it had the right to sell the routes in question. (Jt. Ex. 8) The Union even outlined why the Paolucci award was not applicable to the sale of the routes in the case at bar. (Jt. Ex. 8) The Union pointed out that Respondent had not provided it with any information that the routes in question were not profitable and that servicing these routes was no more costly than providing product to any other local route serviced out of the Dayton (Ohio) Distribution Center/Warehouse. (Jt. Ex. 8) The Union finally noted in its letter that Respondent had not previously sold any route within the local Dayton, Ohio service area. Based on these factors, the Union requested to meet and bargain over the decision to sell the routes. (Jt. Ex. 8) In this letter, the Union also requested Respondent to provide it with certain information regarding the profitability of all of

Respondent's routes and other information related to the sale of the routes. (Tr. 89, 156-157; Jt. Ex. 8)

Finally, on September 12, Respondent, via a letter, responded that it exercised its inherent management right with respect to the selling of the routes. (Jt. Ex. 9) Respondent declined to meet and bargain over the selling of the routes; to delay the selling of the routes pending any decisional bargaining; and, to provide the requested information. (Jt. Ex. 9) On that same date, by letter, Respondent announced the sale of a fourth route – Route #131 – effective September 17. (Tr. 90, 159; Jt. Ex. 10) The Union subsequently filed a grievance over the sale of Route #131. (Tr. 90-91, 160; Jt. Ex. 10)

It is well settled that wages, hours, benefits and other terms and conditions of work are mandatory subjects of bargaining. *Fibreboard Paper Products Corp. v. NLRB,* 279 U.S. 203 (1965); *NLRB v. Katz*, 369 US 736 (1962). It is also settled that the decision to relocate or subcontract unit work that is not accompanied by a basic change in an employer's operation is a mandatory subject of bargaining unless the employer can establish that the work performed at the new location varies significantly from the work performed at the prior location; the work performed at the former location is discontinued entirely and not moved to the new location; or the employer's decision involved a change in the enterprise's scope and direction. *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991, enfd. sub nom, *Food and Commercial Workers Local 150-A v. NLRB,* 1F.3d 24 (D.C. Cir. 1993).

Respondent would contend that the sale of each route is akin to a decision as to whether to be in business or not. Counsel for the General Counsel submits that the sale of these routes to independent contractors is nothing more than substituting one employee or group of employees for another. In fact, one of the purchasers (Krupp) was a member of the bargaining unit up until the time of her September 4 purchase. In *Fibreboard*, supra, the Supreme Court held that an employer's subcontracting of bargaining unit work, in such a way that it merely replaced existing

employees with those of an independent contractor who did the same work under similar conditions of employment, was a mandatory subject of bargaining. *Id*. at 213. The Court went on to find that, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment by the employer and had not altered the employer's basic operation, requiring the employer to bargain about the decision "would not significantly abridge [the employer's] freedom to manage its business." *Id*. The court further found that because the decision turned on labor costs, it was "peculiarly suitable for resolution with the collective bargaining framework." *Id*. at 213-214.

Counsel for the General Counsel submits that the instant case is analogous to *Fibreboard*. Here, Respondent sold routes which were serviced out of the Dayton Distribution Center/Warehouse to independent contractors. Admittedly, these independent contractors performed the same work as Respondent's route sales drivers. They load their trucks with Respondent's products from the Dayton Distribution Center/Warehouse. The independent contractors then deliver Respondent's products to the customers on the routes. These are the same customers that had previously been serviced by Respondent's route sales drivers. (Tr. 993-994, 998) The independent contractors as well as the route sales drivers, stock the product on the customers' shelves or other display bins. Both the independent contractor and the route sales drivers input orders and sales information into a hand held computer that delivers the information to Respondent. (Tr. 71, 80, 187, 996; 1013) Some of the independent contractor's customers continue to maintain their accounts for payment with Respondent. (Tr. 1053) The independent contractors even transport their products in former vehicles that were owned by Respondent. (Tr. 958, 995) In fact, while employed by Respondent, Krupp had operated the same vehicle she purchased from Respondent. (Tr. 995)

Counsel for the General Counsel also submits that the instant case is similar to *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253 (2006) where an employer closed its operation

involving the transportation of automobile parts between several of its customer's facilities, but continued to operate a dedicated run for several more months using owner-operators in place of bargaining unit drivers. The Board, in adopting the judge's findings held that the transfer of bargaining unit work to owner-operators violated Section 8(a)(1) and (5) of the Act. *Id*. at 258. The Board held that such a decision is a mandatory subject of bargaining pursuant to *Fibreboard*, supra. and *Torringtron Industries*, 307 NLRB 809 (1992). The Board rejected the employer's contention that the decision to replace employee drivers with owner-operators was a change in the scope, nature, and direction of its enterprise pursuant to *First National Maintenance Corp. v. NLRB*, 452 US 666 (1981), *Id.*at 258. The Board further held that the transfer of the dedicated run to owner-operators involved "nothing more than the substitution of one group of workers for another to perform the same work." *Gaetano & Associates*, 344 NLRB 531, 533 (2005), citing *Fibreboard* and *Torrington*, supra. See also, *Naperville Ready Mix Inc.*, 329 NLRB 174, 181 (1999), enf'd 242 F.3d 744 (7th Cir. 2001) cert. denied 534 US 1040 (2001).

In *Gaetano & Associates*, supra. the evidence disclosed that shortly after the union was certified as the bargaining representative of its carpenters, the employer subcontracted its insulation, sheetrock, spackle, and taping work performed by its carpenters. The Board, in affirming the judge's decision, found that the decision "to subcontract the carpentry work was a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature and direction of the enterprise." *Id.* at 533.

Counsel for the General Counsel urges the Administrative Law Judge to find in the instant case that Respondent's selling off of routes is nothing more than the subcontracting of the route sales drivers' work and involves the substitution of an independent contractor for a route sales driver to perform the same work and does not constitute a change in the scope, nature and direction of their enterprise which is the manufacture and distribution of snack foods. (Tr. 232)

In *Dubuque Packing Co*., 303 NLRB 386, 391 (1991), enfd. sub nom *Food and Commercial Workers Local 150-A v. NLRB*, 1F.3d 24 (D.C. Cir. 1993*),* the Board enunciated the test for determining whether a work relocation decision, which it considered closer to subcontracting rather than a partial closure decision, is a mandatory subject of bargaining. *Id.* at 391-53. Under this test, Counsel for the General Counsel has the burden of showing that the decision was unaccompanied by a basic change in the nature of Respondent's operation. Counsel for the General Counsel urges the administrative law judge to find that she has met that burden. Thereafter, the burden shifts to Respondent to establish that either the subcontracted work or the work performed at the new location varies significantly than that performed by its route sales drivers at its Dayton Distribution Center/Warehouse; or that the work performed at the former location or by the route sales drivers is to be discontinued entirely and not moved or transferred to the subcontractors, or that Respondent's decision involves a change in the scope and direction of its business.

Counsel for the General Counsel submits that Respondent's decision to sell certain territorial routes to subcontractors is a mandatory subject of bargaining and Respondent has not met its burden because the sale of its delivery routes did not alter its basic operation of manufacturing and distributing snack food products to various retail customers. Respondent is producing the same product for the same customers under essentially the same working conditions.

Respondent argues that *First National Maintenance Corp. v. NLRB*, 452 US 666 (1981) is controlling. However, Counsel for the General Counsel submits that *First National Maintenance* is not controlling. The instant cases does not involve the partial closing of Respondent's operation. Kazer testified that Respondent could not shutter the route sales operation because of the financial liability it would owe to the Central States Pension Fund.

(Tr. 579-582;845) Moreover, there was no evidence presented that Respondent is going out of the distribution business entirely. It continues to sell products directly to certain customers. Equally important, Respondent has a longstanding practice of utilizing both its route sales drivers as well as subcontractors/independent contractors to distribute its product to the same range of retail customers. Counsel for the General Counsel submits that the sale of these four additional routes represents a marginal change in Respondent's distribution operations.

The instant case is distinguishable from *NLRB v. Adams Dairy*, 350 F.2d 108(1965) where the employer completely changed its existing distribution system by eliminating it and selling its products to independent contractors. The employer also sold all of its trucks previously used by all of its driver-salesmen to these independent distributors. In *Adams Dairy*, the employer did not finance the sale nor in any way arrange for such financing. Neither did the routes driven by the independent distributors correspond to the previous routes of the driver-salesmen.

Another case distinguishable on similar factors is *West Virginia Baking Co.*, 299 NLRB 306 (1990) which involved the complete liquidation of the employer's driver-salesmen method of distribution. The Board adopted the administrative law judge's decision that this change involved a fundamental change in the nature and direction of the employer's operation. Clearly, the instant case does not involve Respondent changing and eliminating its distribution system. Respondent sold two of its trucks and, in fact, financed the sale of those trucks. (Tr. 588-589, 644, 958) Moreover, the independent contractor's routes in the instant case correspond to the routes of Respondent's route sales drivers. Moreover, in the instant case both Respondent and the independent contractors could terminate their contract, without cause, with a thirty (30) day notice. If Respondent terminated these contracts it, of course, could return the routes to its in-house delivery system or it could arguably re-sell the route.

In *First National Maintenance*, supra, the Supreme Court concluded that management decisions fell within three categories: (1) issues that settle an aspect of the relationship between the employer and employees; (2) those which have an indirect and attenuated impact on the employment relationships; and (3) one that has a direct impact on employment and has its focus only the economic profitability. In *First National Maintenance*, supra., the Court concluded that the employer's decision to terminate one of its maintenance contracts causing the layoff of some of its employees fell within the third category in that it had a direct impact on employment because it leads to job loss, but has as its focus only the economic profitability of the enterprise 452 US. at 677. The Court ruled that the termination of the maintenance contract was not a mandatory subject of bargaining. The Court characterized the employer's decision of being akin to the decision of whether to be in business at all and found that it was a change in the scope and direction of the business and, therefore, there was no duty to bargain over it. *Id.* at 677, 686-688. In applying a balancing test which took into account the amenability of the subject matter of the decision to the bargaining process, the Court found that in view of an employer's need for unencumbered decision making, bargaining over a management decision that has a substantial impact on the continued availability of employment should only be required if the benefit, for labor relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

Counsel for the General Counsel submits that Respondent's decision to sell some of its distribution routes falls under the third category of decisions discussed in *First National*. Even under that test, Respondent's argument fails in that this decision would have a substantial impact on the continued availability of employment. Therefore, the benefit of labor relations and the collective bargaining process, outweighs the burden placed on the business. Clearly, there was no need to act with speed or secrecy with respect to these sales. It is clear that part of Respondent's decision involved labor costs. Respondent argues that by selling routes to

subcontractors/independent contractors that it was transferring all of the risk to them. That risk includes labor costs and all of the incidental costs associated with labor costs. Arguably, some of these costs could have been amenable to collective bargaining.

Counsel for the General Counsel submits that Respondent's decision to sell Routes #102, #104, #122 and #131 was a mandatory subject of bargaining. Counsel for the General Counsel urges the administrative law judge to so find.

B. <u>The Union Did Not Waive Its Right to Bargain Over the Route Sales</u>:

Respondent contends that based on the management rights clause in the expired bargaining agreement and the terms of its revised final offer, the Paolucci award and past practice that the Union waived its right to bargain over the sale of these four routes. It is well settled that a waiver must be clear and unequivocal, unmistakable, *Metropolitan Edison Co. v. NLRB*, 460 US 693, 708 (1983). A waiver will be found where "bargaining partners . . . unequivocally and specifically express their mutual intentions to permit unilateral employer action with respect to a particular employment term, not withstanding the statutory duty to bargain that would otherwise apply". *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). *American Diamond Tool, Inc.*, 306 NLRB 570 (1992).

Waivers can occur in any of three ways: by express provision in the bargaining agreement; by the conduct of the parties (including past practices, bargaining history and action or inaction), or by a combination of the two." *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F. 2d 633, 636 (2d. Cir 1982).

The Supreme Court has held in *Litton Financial Printing Div. v. NLRB*, 501 US 190, 190 (1991) that some terms and conditions of employment, including arbitration clauses do not survive the expiration of a bargaining agreement.

Similarly in *Beverly Health & Rehabilitation Services*, 335 NLRB 635; 636 (2001) *enfd in relevant part*, 317 F.3d 316, (D.C. Cir 2003), the Board, in adopting the judge's findings, held

that the employer violated Section 8(a)(1) and (5) of the Act by implementing a number of unilateral changes in the terms of employment and working conditions at one (1) or more of its twenty (20) nursing homes. The judge found that the management-rights clause cited by the employer in those agreements did not survive the expiration of the contract. The Board held that the unilateral changes at issue (altering work hours, disciplinary policy, absenteeism policy, job descriptions and duties, medical leave, etc.) were mandatory subjects of bargaining. The Board further held, in responding to a dissenting member, that the essence of the management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls. *Id.* at 636.

Additionally, Respondent will argue that it revised its final offer in June 2013 which contained clauses constituting the Union's waiver. This argument does not hold water in that the Region has determined that this "revised final offer" was unlawfully implemented because the parties had not reached impasse. As noted at the hearing in the instant case that matter (Mike Sell's Potato Chip Company, 360 NLRB 131 (2014) is currently pending a Compliance Specification Hearing.) Respondent is disingenuous in claiming that it implemented a lawful revised final offer in June 2013. That issue is currently pending in the Compliance Specification. Moreover, Respondent has not completely complied with the Board order in that case. The case at bar is similar to *Naperville Ready Mix, Inc.* supra, where the Board rejected the employer's argument the parties had reached an overall contract impasse privileging it to implement its final offer. The Board noted that the employer embarked on its unilateral implementation before they had exhausted their own ability to compromise, let alone considered what further consessions the union had to offer. The Board further held that even if the parties had reached a deadlock it would not have immunized the employer's implementation of the truck sale and subcontracting plan because the impasse was taunted by the employer's prior unremedied unfair labor practices.

Generally, a lawful impasse cannot be reached in the presence of unrendered unfair labor practices. *Id*. at 183, See also, *Bottom Line Enterprises*, 302 NLRB 373 (1991)

Assuming arguendo that Respondent lawfully implemented its "revised final offer" it is clear that Respondent could not impose a management clause, or its functional equivalent without the Union's consent because such clauses are contract-dependent. In *McClatchy Newspapers*, 321 NLRB 1386 (1996), the Board, on remand, in discussing the "implementation after impasse doctrine" noted that such implementation is not permissible regarding specified proposals. The Board held that proposals which are "contract bound" or involve a "statutorily guaranteed right" such as arbitration and even those which had been agreed to in their expired contracts such as union-security clauses, dues checkoff clauses, or no-strike provisions could not appropriately be unilaterally thrust upon a party without its agreement to be bound. *Id. at 1390*.

Counsel for the General Counsel submits that in any event, the provisions of the revised final offer (Resp. Ex. 3) are too general to privilege Respondent's unilateral actions since the provisions do no specifically address the right to sell or eliminate routes. (See Resp. Ex. 3, pp. 8, 10-11, 18) *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, (1994) involved the halting of operations at a unionized facility, the laying off of bargaining unit employees, and the transferring of bargaining unit work to a group of its non-unionized employees (drivers). The Board, in adopting the administrative law judges finding, held that the management-rights clause, which is similar to management rights clause in the instant case, does not act as a waiver and would only be found when it has been made in a clear and unequivocal manner. *Id.* at 1022, fn. 8. See also, *Public Service Co*., 312 NLRB 459, 460-61 and fn. 6 (1993) where the Board held that the union did not waive its right to bargain over subcontracting by virtue of a general management rights clause or negotiation of a specific provision prohibiting subcontracting in very limited circumstances. *Reece Corp.*, 294 NLRB 448, 448, 450-451 (1989) (there was no waiver found where the management rights clause and severance pay provision only addressed

permanent abandonment of production and not the transfer of work elsewhere). Counsel for the General Counsel also notes that the route bidding procedure does not speak to Respondent's prerogative to sell routes, it merely addresses one effect of such a change - the opportunity for employees to bid on the routes of less senior drivers.

The Paolucci arbitration award does not compel a conclusion that the Union had waived its right to bargain. The arbitration merely determined that the bargaining agreement did not prohibit Respondent from selling routes, not that the agreement privileged it to do so. See, *Dubuque*, supra, where no waiver was found where the arbitrator merely held that the relocation of unit work did not constitute subcontracting and therefore did not violate the contract, but did not address the separate question of whether the management rights clause contained a waiver of the union's bargaining rights.

Additionally, Counsel for the General Counsel submits that Respondent's argument that it was privileged to sell Routes #102, #104, #122 and #131 because of its past practice of selling routes without objection. In 2012, the Union grieved the selling of a Marion, Ohio route that resulted in the Paolucci award. This sale, and all subsequent sales prior to 2017, admittedly involved outlying, distant and remote routes which were serviced by outlying warehouses or other storage facilities where Respondent's product was transported to these remote areas via a tractor-trailer from the Dayton Distribution Center/Warehouse. Moreover, these routes were unprofitable partly due to the extra cost in transporting the product to these remote areas. The Board recently ruled in *E.I. DuPont de Nemours*, 364 NLRB No. 113 (2016) that practices created pursuant to a management rights clause and implemented during the life of the contract cannot be continued as part of the status quo after contract expiration. *Id.* at slip op 3-4. The Board, in overruling certain cases returned to the policy set out in *Register-Guard*, 339 NLRB 353, 355-356 (2003) where the Board held that unilateral changes made pursuant to a past practice developed under an expired management rights clause were unlawful.

Even if the Union had waived its right to bargain under the collective-bargaining agreement, Respondent could not continue to unilaterally sell routes pursuant to that practice after the contract expired.

Respondent even argues that the Union's failure to object to numerous sales of routes post-Paolucci arbitration award establishes a waiver. To the contrary, it is well settled that a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time. *DuPont de Nemours*, supra at slip. op. 6 (quoting *Owens-Corning Fiberglas*, 282 NLRB 609, 609 (1987). See also, *Mississippi Power Co*., 332 NLRB 530, 531-532 (2000) where the Board held that a union acques[c]ence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might rush to make yet further changes, not even when such further changes are arguably similar to those in which the union may have acquiesced in the past quoting *Exxon Research & Engineering Co*., 317 NLRB 675, 685-686 (1995), *enforcement denied on other grounds*, 89 F.3d 228 (5th Cir. 1996), *enforced in part*, 284 F.3d 605 (5th Cir. 2002).

In *First Energy Generation Corp.*, 358 NLRB 842 (2012) where the employer failed to establish that its unilateral changes to retirement healthcare benefits of current employees when the parties were bargaining over a new contract was unlawful since the employer failed to establish a past practice of making unilateral changes such as the ones at issue in the case. The Board, in affirming the administrative law judge, held that even assuming the union acquiesced in the employer's annual minor programmatic changes, acquiescence alone does not establish a surrender of the right to bargain over future changes for all time. See, *Caterpillar, Inc.*, 355 NLRB 521, 523 (2010*)* enfd. mem. 2011 WL 2555757 (D.C. Cir. 2011). *Id.* at 842.

Further, in *The Philadelphia Coca-Cola Bottling Company*, 340 NLRB 349 (2003), the Board affirmed the judge's findings and conclusions that the employer failed to establish that its occasional distribution of bonuses and gifts to a select group of employees was a past practice.

The administrative law judge also found that union had not waived its right to bargain over this bonus or any other bonus because there was no clear and unmistakable waiver and the employer could not rely on the union's past failure to request bargaining as a waiver.

The Board also found in *Register-Guard, supra,* that a union's acquiescence in previous unilateral changes generally does not constitute a waiver of the right to bargain over such changes in the future.

Counsel for the General Counsel urges the administrative law judge to find that the Union's failure to request bargaining over the sale of distant, remote and unprofitable routes in late 2012 and 2013 does not preclude it from reasserting its interest in the matter once Respondent began selling off nearby, local, higher volume (profitable) routes in the Dayton, Ohio area which were more valuable to the unit and less costly to operate since they did not involve the transportation of the product from the Dayton Distribution Center/Warehouse.

Finally, Respondent contends that the Union never objected to the sale of Route #102. Counsel for the General Counsel asserts that Vance's original grievance (Jt. Ex. 4) objected to Respondent's initial announcement of the sale of three unidentified routes. Route #102 was the first of the routes sold. Route #131 was the last of the routes sold and was not even contemplated by Respondent's initial April announcement. (Jt. Ex. 3) Even assuming the Union never objected to the sale of Route #102, such a failure would not constitute a waiver-by-inaction. Respondent, when announcing the sale of these routes claimed that they were based on the Paolucci award and therefore they were only required to bargain about the effects of the sale and not the decision to sell. Additionally, in September when Respondent refused to meet and bargain about the decision to sell the routes it contended that it had no duty to meet and bargain. (Tr. 273-274, 405) Equally important, Kazer testified at trial that Respondent had no duty to meet and bargain about the decision to sell these four routes. (Tr. 273-274, 405) The instant case is similar to *Roll and Hold Warehouse & Distribution Corp.,* 325 NLRB 41, 42-43 and fn. 7

(1997) enfd, 162 F.3d 573 (7th Cir. 1998) where the employer unilaterally implemented and maintained a new employee attendance policy based on a revolving point system without giving advance notice to any union representative. The Board rejected the administrative law judge's finding that the employer had given sufficient notice to the union and the union did not request to bargain after receiving such notice, thereby relieving the employer of any obligation to bargain and thus not violating the Act. The Board found that Respondent's announcement of the new attendance plan was presented as a fait accompli which precluded the possibility of meaningful bargaining and therefore the union had no reason to request bargain. In addition, the Board found as a result of the employer's testimony at trial that it never intended to bargain in good faith over the change because it took the position it had no need to consult with the union about any change because they had never consulted before.

Under these circumstances, clearly any bargaining request by the union would have been futile. Therefore, the Union did not relinquish its right to bargain over the sale of Route #102 through its alleged inaction.

C. <u>The Employer Violated Section 8(a)(1) and (5) by Failing to Provide Relevant Information</u>:

It is well settled that an employer on request must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty includes the providing of information relevant to contract administration and negotiation. *National Broadcasting Co.*, 352 NLRB 90, 97 (2008); *Pulaski Construction Co.*, 345 NLRB 931, 935 (2005).

Where the requested information concerns terms and conditions of employment of employees within the bargaining unit, the information is presumptively relevant, and the employer has the burden of proving lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997).

In as much as the route sales were mandatory subjects of bargaining, it follows that the Union was entitled to the requested information concerning those sales in order to engage in decisional bargaining. The case at bar is analogous to *Naperville Ready Mix, Inc.*, 329 NLRB 174 (1999) involving an information request regarding the sales of the employer's trucks and related arrangements which amounted to a subcontracting of unit work. The Board held that the employer's refusal to provide the requested information which clearly related to a mandatory subject of bargaining was violative of Section 8(a)(1) and (5) of the Act.

Similarly, in *Litton Systems*, 283 NLRB 973, 974-975 (1987) enfd. on other grounds, 868 F.2d 854 (6th Cir. 1989) the Board held that the employer unlawfully failed to provide information relevant to bargaining over plant relocation, including financial data documenting the plant's annual losses.

Counsel for the General Counsel submits that the requested information - route profitability figures, sales agreements, correspondence with the purchasers, and information on about how the subcontractors/independent contractors will receive Respondent's product - would have enabled the Union to meaningfully evaluate the need for concessions, develop proposals to offset the routes' losses, and assess the impact on the bargaining unit. Respondent's failure to provide the Union with the requested information involving the route sales is unlawful and violative of Section 8(a)(1) and (5) of the Act.

VII. **CONCLUSION**:

Counsel for the General Counsel respectfully urges the Administrative Law Judge to find that Respondent violated Section 8(a)(1) and (5) of the Act by selling its Ohio Routes #102, #104, #122 and #131 without bargaining with the Union. Counsel for the General Counsel requests an order requiring Respondent to rescind the sale of these routes, pay affected employees for any loss of wages and other benefits lost because of the sale of these routes without bargaining with the Union.

Counsel for the General Counsel further urges the Administrative Law Judge to find that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish the Union with the information it requested about August 29, 2016.

VIII. **PROPOSED ORDER AND NOTICE**:

Counsel for the General Counsel urges the Administrative Law Judge to consider the proposed attached Order and Notice to Employees (Attachment A) as a part of the remedy in this case.

Dated: July 7, 2017

Respectfully submitted,

/s/ Linda B. Finch

Linda B. Finch
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Attachment A

Proposed Order:

Respondent, Mike-Sell's Potato Chip Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

   (a) Failing and refusing to bargain in good faith with the International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No 957 (Union) as the exclusive collective-bargaining representative of our employees over any proposed changes in wages, hours and working conditions before putting such changes in effect.

   (b) Unilaterally selling our sales routes without notification to the Union or affording the Union an opportunity to bargain about such decisions.

   (c) Refuse to provide the Union with information that is relevant and necessary to its representational duties.

   (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act

   (a) Upon request bargain in good faith with the Union.

   (b) Rescind, if requested by the Union, the sales of our Ohio Routes #102, #104, #122 and #131.

   (c) Pay all bargaining unit employees for wages and all other benefits lost because of the sales of Ohio Routes #102, #104, #122 and #131 and compensate them for any adverse tax consequences, with interest, as a result of receiving a lump-sum backpay award.

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain in good faith with International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957 (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All sales drivers, and extra sales drivers at the [Respondent's] Dayton Plant, Sales Division and at the [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over-the-road drivers employed by the [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by the [Respondent].

WE WILL NOT refuse to meet and bargain in good faith with your Union over any proposed changes in wages, hours and working conditions before putting such changes into effect.

WE WILL NOT change your terms and conditions of employment by unilaterally selling our routes without notification to the Union or affording the Union an opportunity to bargain regarding these decisions.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request, bargain in good faith with the Union as the exclusive collective-bargain representative of our unit employees about the sale of Routes #102, #104, #122 and #131.

WE WILL if requested by the Union, rescind the sales of our Ohio Routes #102, #104, #122, and #131 that we made without bargaining with the Union and assign those routes to unit employees.

WE WILL pay you for the wages and other benefits lost because of the sales of our Ohio Routes #102, #104, #122, and #131 that we made without bargaining with the Union, plus interest.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement, a report allocation the backpay award to the appropriate calendar year(s).

WE WILL promptly furnish the Union with the following information requested in its August 29, 2016 information request letter: (1) documents showing the profitability of Respondent's routes for the period September 1, 2014 through August 1, 2016 so a comparison could be made between all of the routes to Routes #104 and #122; (2) a copy of the agreement between Respondent and the entity who is scheduled to purchase these routes; (3) a description of how Respondent's product is to be received by the entities purchasing these routes; and, (4) a copy of all correspondence between Respondent and the entity who is scheduled to purchase these routes.

MIKE-SELL'S POTATO CHIP COMPANY
(Employer)

Dated:_____ By:_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov

Telephone:
Hours of Operation:

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

July 7, 2017

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by electronic mail to the following addresses listed below:

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